Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

LESLIE K. BRAUN,
Petitioner,

v.

JEFFREY DAVID HEADLEY,
Respondent.

On Petition for a Writ Of Certiorari to the Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a custodial parent's constitutional right to travel is impermissibly infringed upon when a reviewing court uses the custodial parent's relocation as grounds constituting a material change in circumstances warranting automatic review of custody of the child?

TABLE OF CONTENTS

Opinions below 1
Jurisdiction 2
Pertinent Constitutional Provision 2
Statement 3
Argument 11
Conclusion 22

Appendices:

Appendix A -- Court of Appeals of Maryland
7/26/00 Order ..... App. 1
Appendix B -- Court of Special Appeals
of Maryland Opinion, 4/26/00 ..... App. 2
Appendix C -- Circuit Court for Harford
County, Maryland Decision, 4/20/99 ..... App. 35

TABLE OF AUTHORITIES

Cases:

Aptheker v. Secretary of State,
378 U.S. 500 (1964) 20
D'Onofrio v. D'Onofrio, 365 A.2d 27 (N.J. Super.),
aff'd, 365 A.2d 716 (N.J. Super. 1976) 15

Cases--Continued:

Domingues v. Johnson, 323 Md. 486,
593 A.2d 1133 (1991) 4, 11, 13
Fossum v. Fossum, 545 N.W.2d 828 (S.D. 1996) . 15
In re Custody of D.M.G. and T.J.G.,
951 P.2d 1377 (Mont. 1998) 13
In re Marriage of Burgess,
913 P.2d 473 (Cal.4th 1996) 15, 20
In re Marriage of Cole,
729 P.2d 1276 (Mont. 1986) 13
In re Marriage of Francis,
919 P.2d 776 (Colo. 1996) 15
In re Marriage of Sheley,
895 P.2d 850 (Wash. App. 1995) 15
Jaramillo v. Jaramillo,
823 P.2d 299 (N.M. 1991) 13, 14
Jordan v. Jordan, 50 Md. App. 437,
439 A.2d 26 (1982) 15
LaChapelle v. Mitten,
607 N.W.2d 151 (Minn. App. 2000) 13
Matter of Marriage of Greene,
812 P.2d 11 (Ore. App. 1991) 15
Palmore v. Sidoti, 466 U.S. 429 (1984) 3, 19
Saenz v. Roe, 526 U.S. 489,
119 S. Ct. 1518 (1999) 12, 17, 18, 19

Cases--Continued:

Shapiro v. Thompson, 394 U.S. 618 (1969) 2-3, 12, 17
United States v. Guest, 383 U.S. 745 (1966) ... 12, 17
Wagner v. Wagner, 109 Md. App. 1, *cert. denied*, 343 Md. 334 (1996) 3
Watt v. Watt, 971 P.2d 608 (Wyo. 1999) 15, 16
Zobel v. Williams, 457 U.S. 55 (1982) 18

Statutes:

Md. Code Ann., Fam. Law Art. (2000):

§ 1-201(a)(5) to (a)(6) 3
§ 1-201(b)(4) 3

No. _____

In the Supreme Court of the United States

LESLIE K. BRAUN, PETITIONER,

v.

JEFFREY DAVID HEADLEY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Leslie K. Braun respectfully petitions for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINIONS BELOW

The denial of Ms. Braun's petition for a writ of certiorari to the Court of Appeals of Maryland (App.,

infra, 1a) is reported at 359 Md. 669 (table). The opinion of the Court of Special Appeals of Maryland (App., *infra*, 2a-34a), is reported at 131 Md. App. 588, 750 A.2d 624 (2000). The opinion of the Circuit Court for Harford County, Maryland (App., *infra*, 35a-46a) is unreported.

JURISDICTION

The Court of Appeals of Maryland, the highest court in the State of Maryland in which a decision could be had, denied Ms. Braun's petition for a writ of certiorari on July 24, 2000. The opinion of the Court of Special Appeals of Maryland was filed on April 26, 2000, and mandate issued on May 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The right to travel is not explicitly set forth in the United States Constitution, however, this Court long ago "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which

unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). "[T]he right is so important that it is 'assertable against private interference as well as governmental action * * * a virtual unconditional personal right." *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 1524 (1999) (quoting *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring)).

STATEMENT

1. Under Maryland law, a circuit court has the jurisdiction and authority to decide child custody and visitation issues. Md. Code Ann., Fam. Law Art. 1-201(a)(5) to (a)(6). Once custody and visitation is determined, the court retains jurisdiction over the case to decide any future issues regarding its determination. *Id.*, 1-201(b)(4). When a Maryland court revisits these issues, a threshold determination must be made: does there exist a material change in circumstances. A change in custody proceeding is generally "a chronological two-step process." *Wagner v. Wagner*, 109 Md. App. 1, 28, *cert. denied*, 343 Md. 334 (1996). If the circumstances do not constitute a material change, then the threshold burden has not been met, and the court's inquiry must cease. *Ibid.* If a material change is found to

exist, "then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding." *Ibid.* Under Maryland law, "the relocation of a child may constitute a change in circumstances sufficient to trigger a review of custody." App., *infra*, 2a-3a, *Domingues v. Johnson*, 323 Md. 486, 500, 593 A.2d 1133 (1991).

2. Ms. Braun and Mr. Headley had been former workmates at a graphics company and were engaged to be married. At the time, Ms. Braun lived with her son, Matthew, who was eight at the time, and two roommates in her trailer home located in Abingdon, Maryland. Mr. Headley, however, ultimately decided not to marry Ms. Braun, calling off two wedding dates, May 1 and August 14, 1993. As a result of the relationship, Theresa M. Braun (Theresa) was born on November 11, 1993. Proceedings were brought by Ms. Braun against Mr. Headley to prove paternity and establish child support in the Circuit Court for Harford County. Following the determination that Mr. Headley was the father of Theresa, custody was awarded to Ms. Braun with reasonable visitation given to Mr. Headley on October 21, 1994. A visitation schedule was established for Mr. Headley on March 7, 1995, wherein he received visitation from Friday evening

to Sunday evening on the first, third and fifth weekends of the month and various holidays. During the next three and a half years, the visitation schedule was complied with by Ms. Braun and Theresa stayed with Mr. Headley on his scheduled weekends except on a few occasions.

On October 16, 1998, Ms. Braun moved to Arizona, simultaneously filing a Complaint to Modify Visitation. Ms. Braun suffered from chronic pain due to kyphoscoliosis and she had been differentially diagnosed with multiple sclerosis. She walked with a cane and had trouble getting around. As a result, she stopped working following the birth of Theresa and received disability benefits as well as child support for Matthew and Theresa. Ms. Braun notified Mr. Headley of the move enroute to Arizona by her cellular telephone and informed his father that he would not have visitation that weekend, but that she would contact him once they settled in Arizona. Ms. Braun believed that the move would be beneficial for her health and alleviate much of her pain due to the drier climate. She also believed that the change in climate would be beneficial for Theresa, as Ms. Braun was afraid that Theresa would suffer from asthma if she remained in Maryland. Ms. Braun based this belief

on the fact that Theresa had suffered from bronchitis twice during her infancy and had been prescribed abuterol, a lung dilator, as well as having a family history of asthma. Ms. Braun purchased a single family home in a gated community located in El Mirage, Arizona, which was equipped with a swimming pool, skate track, and basketball courts. Upon purchasing her home, Ms. Braun contacted Mr. Headley and gave him Theresa's new address and telephone number. She then enrolled Theresa in the local elementary school where she immediately began performing well.

Following service of Ms. Braun's Complaint, Mr. Headley filed an Answer on October 22, 1998, a Request for Emergency Custody Hearing and a Counter-Complaint for Custody and/or Modification of Custody on November 2, 1998. In his pleadings, Mr. Headley alleged that Ms. Braun was unfit to have custody of Theresa and that her move to Arizona was in reality an abduction, intended to separate him and Theresa. He further alleged that Ms. Braun was mentally disturbed, could not physically care for Theresa, that her home was not clean, and that he was more capable of raising Theresa and could provide better care for her with the help of his parents. Ms. Braun filed a

Consolidated Answer to Mr. Headley's Counter Complaint and Answer to Request for Emergency Custody Hearing on November 16, 1998, emphatically denying all of his allegations. Ms. Braun further alleged that Mr. Headley had never lived away from his parents' home and that since he could not handle the responsibility of living independent of his parents that he certainly could not be expected to be responsible for raising Theresa.

3. A three day trial was held on April 16, 19 and 20, 1999. At its conclusion, the Honorable Cypert O. Whitfill, Circuit Judge of the Circuit Court for Harford County, Maryland held that the "move by Miss Braun to Arizona is a change in circumstances that's been recognized by the Appellate Courts to warrant a review of a child custody situation." App., *infra*, 37a. Judge Whitfill believed that Ms. Braun had moved to Arizona to separate Theresa from Mr. Headley, and that the health of either Theresa or Ms. Braun did not justify the move. *Ibid.*. He further held that Ms. Braun was not a reliable witness and that she did not allow her daughter to keep mementos from Mr. Headley. *Ibid.*. He also believed that Ms. Braun did discourage Theresa from referring to Mr. Headley as "dad" or his parents as "grandmother" or "grandfather." *Id.* at 38a. Judge

Whitfill further believed that Theresa was guarded and afraid to speak out. *Id.* at 39a.

Turning to Matthew, Judge Whitfill held that Ms. Braun's son did use derogatory terms in front of Theresa and that Ms. Braun did not discourage it. App., *infra*, 39a. Judge Whitfill also found that it was Ms. Braun who was unwilling to communicate with Mr. Headley and that the number of telephone calls that had to be placed by him in order to speak to Theresa in Arizona was evidence of this. *Id.* at 39a-40a. According to Judge Whitfill, one of his most significant findings was that Ms. Braun gave no consideration to the impact that moving to Arizona would have on Theresa or herself. *Id.* at 41a.

Although not relying on Dr. Gombatz's report as a primary tool in reaching his decision, Judge Whitfill stated that Dr. Gombatz's diagnosis and observations were consistent with his own observations in the courtroom and that a narcissistic personality disorder produces a personality that is extremely difficult to work with. App., *infra*, 42a. He believed that no thought was given to the consequences of removing Theresa from Maryland without resolving the visitation issue first. *Ibid.* Judge Whitfill reasoned that her decisions were

based solely on her dislike for Mr. Headley and his failure to follow through and marry her. *Id.* at 43a. Judge Whitfill believed that Ms. Braun rationalized her behavior, reasoning that if she was not good enough for Mr. Headley then he was not good enough to be with her child. *Id.*. at 44a. This was not a good enough reason to Judge Whitfill for the move and he believed that Ms. Braun could not separate her needs from that of her child. *Id.* at 45a.

Judge Whitfill also recognized that Mr. Headley had personality problems of his own and was a very dependent individual. App., *infra*, 44a. He found, however, that the Headley household (Mr. Headley and his parents), was a healthy family unit and more stable than Ms. Braun's. *Id.* at 45a. He held that Ms. Braun did not have the capacity to put the interests of the child ahead of her own interests. *Ibid.* Judge Whitfill concluded that there was no legitimate reason for Ms. Braun to move to Arizona and did so to reduce contact between Theresa and Mr. Headley. *Ibid.*

In addressing Ms. Braun's right to travel, Judge Whitfill stated "[i]t is Mrs. Braun's choice as to whether or not she stays in Arizona. I have no power to order her to live anywhere but I do have

the power to tell her where the child is going to be and she can choose to be close to that child or she can choose to be on the other side of the world from that child. That's her choice." App., *infra*, 46a.

And, although Judge Whitfill recognized that Theresa had been in the care and custody of her mother and lived with her brother since birth, loving both of them very much, he also found a strong bond between Theresa and Mr. Headley and his parents. App., *infra*, 46a. With that said, Judge Whitfill changed custody from Ms. Braun to Mr. Headley, withholding the issue of visitation for another time. *Ibid.*

4. Following the submission of briefs and oral argument, the Court of Special Appeals of Maryland issued its opinion on April 26, 2000. App., *infra*, 2a-34a. In upholding the discretion exercised by Judge Whitfill in changing custody, the court of special appeals held that the "appropriate interplay" between the custodial parent's right to travel and the state's compelling interest in determining the best interests of the child was to find no presumption for either parent. *Id.* at 26a. "There is no constitutional infirmity in giving equal status, in determining the child's best interests, to (1) the custodial parent's right

to travel, and the benefit to be given the child from remaining with the custodial parent; and (2) the benefit from the non-custodial parent's exercise of his right to maintain close association and frequent contact with the child." *Ibid.* The court cited to *Domingues v. Johnson*, 323 Md. 486 (1991), stating that, while the highest Maryland appellate court did not explicitly address the right to travel, that decision nonetheless set forth the appropriate considerations where the right to travel was implicated. *Ibid.* In so ruling, the court of special appeals placed Maryland in the majority of states holding that the constitutional right to travel is qualified by the best interests of the child standard.

5. The Court of Appeals of Maryland declined to review this case on July 24, 2000, denying Ms. Braun's petition for a writ of certiorari as "there has been no showing that review by certiorari is desirable and in the public interest." App., *infra*, 1a.

ARGUMENT

The decisions of both appellate courts of Maryland in the instant case and in *Domingues, supra*, squarely conflict with this Court's right to travel precedence. The right to travel from one state

to another "is firmly embedded in our jurisprudence." *Saenz v. Roe*, 119 S. Ct. 1518, 1524 (1999) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)). The right is so important that it is "assertable against private interference as well as government action * * * a virtually unconditional personal right, guaranteed by the Constitution to us all." *Ibid.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). Yet, the majority of states that have explicitly addressed the issue have, like Maryland, held that the custodial parent's constitutional right to travel is qualified by the state's interest as guardian of children within its borders. The position taken by these states cannot be reconciled with the fundamental nature of this right, and, indeed, the states that have found the right to be qualified have not conducted the required strict scrutiny analysis. They may find the state's interest as guardian to be a compelling one, but they do not address whether the measure taken is narrowly tailored to achieve that end. In these states, a move by that parent has simply become a *per se* material change in circumstances, sufficient for the reviewing court to revisit the original custody determination. Rather than place the custodial and noncustodial parent on "equal status," as the Maryland Court of Special Appeals stated, the use of the relocation as the

precipitating factor triggering a review of custody and the best interests analysis creates a significant burden upon the custodial parent of whether to exercise the constitutional right to travel at all. The chilling effect this can have on a person's fundamental constitutional right cannot be allowed to continue in the guise of a state's paternalistic responsibilities over its wards. This case presents a question concerning a fundamental constitutional right enjoyed by every custodial parent that has been decided differently by the courts of last resort of the several states. Review by this Court is therefore warranted.

1. The majority of states that have explicitly addressed this issue have held that the right to travel is qualified in child custody cases and "must be subject to the state's compelling interest in protecting the best interests of the child by application of the best interests standard." App., *infra*, 18a (citing *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. App. 2000); *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1381 (Mont. 1998); *In re Marriage of Cole*, 729 P.2d 1276, 1280 (Mont. 1986); *Jaramillo v. Jaramillo*, 823 P.2d 299, 304 (N.M. 1991)); *see also Domingues v. Johnson*, 323 Md. 486 (1991) (implicitly addressing the best interests standard in the context

of the constitutional right to travel). As such, the majority position holds that "neither party is under a burden to prove which arrangement will best promote the child's interests; both parents share equally the burden of demonstrating how the child's best interests will be served." *Jaramillo*, 823 P.2d at 308. These jurisdictions impose the two prong test as does Maryland; there must be a material change in circumstance before the court's original custody determination can be revisited. *Id.* at 309. And, as in Maryland, a relocation by the custodial parent is a *per se* material change in circumstances that justifies such revisiting. *Ibid.* ("In almost every case in which the change in circumstances is occasioned by one parent's proposed relocation, the proposed move will establish the substantiality and materiality of the change. It then becomes incumbent on the trial court to consider as much information as the parties choose to submit * * * and to decide what new arrangement will serve the child's best interest.").

2. There are, however, a significant minority of states that either explicitly or implicitly hold the right to travel to be fundamental and that this right is "not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstances and

establishes the detrimental effect of the move upon the children."[1] *See Watt v. Watt*, 971 P.2d 608, 615 (Wyo. 1999) (explicitly holding that relocation of the custodial parent cannot constitute a material change in circumstances because to so hold would violate the custodial parent's constitutional right to travel); *see also In re Marriage of Burgess*, 913 P.2d 473, 480 (Cal.4th 1996), *Matter of Marriage of Greene*, 812 P.2d 11, 11 (Ore. App. 1991), *In re Marriage of Sheley*, 895 P.2d 850, 856 (Wash. App. 1995), *Fossum v. Fossum*, 545 N.W.2d 828, 832-833 (S.D. 1996), *In re Marriage of Francis*, 919 P.2d 776, 784 (Colo. 1996), *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Super.), *aff'd*, 365 A.2d 716 (N.J. Super. 1976). The *Watt* Court noted that inhibitions on the right to travel are

> never imposed upon the non-custodial parent who is free to move at will despite the location of the children. The motives of the non-custodial parent will not be questioned by the court with

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[1] Interestingly, Maryland previously applied the *Watt* rationale from 1982 to 1991 when the court of appeals reversed the intermediate appellate court's decision in *Jordan v. Jordan*, 50 Md. App. 537, 439 A.2d 26 (1982). *Jordan* held that relocation of the custodial parent was not a material change in circumstances warranting a review of custody. In fact, the *Jordan* Court reasoned that the "great weight of authority in this country permits a minor child to move freely with the custodial parent." 439 A.2d at 31.

> respect to such relocation, and the custodial parent has no power to inhibit it. The inherent inequities of such a situation stand as an additional reason that courts have concluded that custodial parents should be permitted to move with their children.

971 P.2d at 616. The *Watt* Court went on to hold that the right of the custodial parent to relocate with his or her children is constitutionally protected, and that "a court may not order a change in custody based upon that circumstance alone. Some other change of circumstances, together with clear evidence of the detrimental effect of the other change upon the children, is required." *Id.* at 616-617. Such circumstances "necessarily would have to be sufficiently deleterious to the welfare of the children that by itself it would serve as a substantial and material change in circumstances even in the absence of a relocation." *Id.* at 617.

Thus, while only one state appellate court has explicitly held that consideration of relocation by the custodial parent as a material change in circumstances violates the right to travel, a considerable number of states have adopted the rationale in handling such cases.

3. This Court recently addressed the right to travel in *Saentz v. Roe*, 119 S. Ct. 1518 (1999). That case involved the California State Legislature's enactment of new welfare laws limiting the amount of benefits received by new residents to that which they would have received in their original state of residence for their first year of residency in California. *Id.* at 1521. The Court began by noting that, although the word "travel" is not found in the text of the Constitution, the constitutional right to travel from one State to another "is firmly embedded in our jurisprudence." *Id.* at 1524 (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)). The right is so important, reasoned the Court, that it is "assertable against private interference as well as governmental action * * * a virtually unconditional personal right, guaranteed by the Constitution to us all." *Ibid.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)).

California argued that its denial of full benefits to new residents did not violate their right to travel because they were not totally ineligible for benefits during their first year of residency, but only limited to that which they would have received in their previous state of residence. 119 S. Ct. at 1525.

California further argued that because it was not an outright denial of benefits designed to impede a person's right to travel, but rather a budgetary restraint, that the statute should only be subjected to the rational basis test instead of strict scrutiny. *Ibid.*

The Court rejected this argument,[2] stating that its cases had not "identified any acceptable reason for qualifying the protection afforded by the [Equal Protection] Clause for the citizen of State A who ventures into State B to settle there and establish a home." 119 S. Ct. at 1526 (quoting *Zobel v. Williams*, 457 U.S. 55, 74 (1982) (O'Connor, J., concurring)) (internal quotations omitted). The Court further rebuffed California's argument that the welfare scheme only incidentally affected the right to travel:

> Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser

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[2] In analyzing the issue, the Court stated there were three different components contained in the right to travel. The first protects the right of the citizen to enter and to leave another State, the second the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and the third protects those travelers who elect to become permanent residents, guaranteeing the right to be treated like other citizens of that State. 119 S. Ct. at 1525.

> incursion on the right to travel than an outright denial of benefits. But since the right to travel embrace's a citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

Id. at 1527 (citation omitted). Thus, under the strict scrutiny standard, the law failed.

4. Likewise, the holding of Maryland's appellate courts and the majority of states that have explicitly addressed the issue should be reviewed under the strict scrutiny standard. While a decision by a court as to where children reside does not directly impair the custodial parent's right to travel, it nonetheless does so indirectly by its deterrent effect. Ms. Braun does not challenge the states' compelling interest in protecting the interests of children. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."). However, even "though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of * * * abridgement must be

viewed in the light of less drastic means for achieving the same basic purpose." *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). Ms. Braun's right to travel cannot be trampled on by Maryland simply because of state paternalism. The policy reasons supporting the *Watt* analysis were articulated by the Supreme Court of California in *In re Marriage of Burgess*:

> As this case demonstrates, ours is an increasingly mobile society. Amici curiae point out that approximately one American in five changes residences each year. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to "micromanage" family decisionmaking by second-guessing reasons for everyday decisions about career and family.

913 P.2d at 480-481. The majority's view simply runs roughshod over the custodial parent's right to travel by having an undeniable chilling effect on it and forcing that parent to choose between moving for whatever reason and possibly losing his or her children in a second custody determination. The argument that such a scheme places the litigants on equal footing is illogical and unrealistic. Therefore, this Court should grant Ms. Braun's petition and review this issue, giving the states, parents, children and practitioners consistent guidelines to follow at this crossroad of a custodial parent's fundamental constitutional right to travel and the state's compelling interest in protecting children.

CONCLUSION

The Petitioner, Leslie K. Braun, respectfully requests that this Honorable Court grant her petition for a writ of certiorari and decide this important constitutional question in light of the conflict among the states in addressing the issue.

Respectfully submitted.

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